Frelinghuysen, Hon. Frederick T.
Remarks and Opinion
before the Electoral Com-
mission - 1877.

REMARKS AND OPINION

OF

HON. F. T. FRELINGHUYSEN,

OF NEW JERSEY.

I. The important question to be decided by the Commission, as both political parties distinctly understood when the bill creating the Commission was passed, is whether the Commission has jurisdiction or right to look behind and reverse the determination of that tribunal which in the several States has by law been established finally to decide who have been elected presidential electors.

This Commission has in the language of the act creating it "the same powers, if any, now possessed for that purpose, [the purpose of counting the electoral vote] by the two Houses acting separately or together."

The question then is, what powers have the two Houses of Congress acting separately or together when counting the electoral vote for President? The Commission has the same; no less, no more.

When the two Houses meet to count the votes of the electors for President they do not act in their legislative capacity, but as a tribunal upon which is imposed that special duty. The legislative powers of Congress are specified in the Constitution, and counting the electoral votes is not among them. The President of the United States, whose concurrence is essential to all legislative action, has no part in this procedure. The two Houses in counting the vote not only have no legislative power, but also have none of those powers so constantly used, and which only exist as and because they are incident to the legislative power; such as sending committees of Congress to investigate the condition of affairs in different parts of the country, that Congress may possess information on which to base future legislation. Neither has Congress in counting the votes such power to investigate by committees or otherwise the election of presidential electors as it possesses for the purpose of ascertaining whether its members have been fairly elected, because while the Constitution expressly declares that "each House shall be judge of the elections, returns, and qualifications of its own members," it no-

where declares, either expressly or by implication, that Congress shall be such judges as to the election of presidential electors; and this clear provision conferring the power to investigate elections for Senators and Representatives, and the absence of any such provision as to electors, is significant and emphatic of the truth that no such power exists as to electors. Neither do the two Houses possess the judicial power belonging to a court when trying the title to an office, because by the Constitution the judicial, legislative, and executive powers of the Government are carefully kept separate and distinct. The legislative branch possesses no judicial power excepting in the two specified cases of judging of the election of members of Congress and in cases of impeachment. The two Houses when they meet to count the votes do not assemble as a joint convention, but as two distinct Houses, and separate to vote on any question that arises; and the very nature of this special tribunal, consisting of two distinct Houses, is inconsistent with having a jury, with having confronting witnesses; there are no parties, and there is nothing about the procedure that is judicial.

What power, then, do the two Houses of Congress possess? Just that power named in the Constitution when it says, "the votes shall then be counted." And what votes are then to be counted? Surely not the votes that have been given for the presidential electors by some seven millions of voters over a vast continent, but the votes cast by the presidential electors for President and Vice-President which the Constitution provides shall be certified to the President of the Senate and by him opened in the presence of the two Houses.

The two Houses in counting the votes of the electors may determine whether the State is in such relations to the Federal Government as to be entitled to vote; whether the votes were cast on the day prescribed by the statutes of the United States; whether the governor's certificate is genuine; whether that certificate is true in its statement as to who have been appointed electors by the State; but the truth of the statement of the governor's certificate in this regard is to be decided only by looking to the determination of the tribunal which the laws of the State say shall finally determine that fact, and not by a canvass of the popular vote of the State. The two Houses may inquire into any thing consistent with the nature of the procedure, and which the Constitution has not devolved on the States to regulate.

The reasons that the Constitution does not either expressly or by implication provide or intend that Congress shall inquire into or canvass the election of presidential electors are apparent.

The framers of the Constitution, as its history shows, did first decide that the President and Vice-President should be chosen by Congress; but on full debate and mature deliberation they saw the

evil of placing one co-ordinate branch of Government under the control of another—the executive under the control of the legislative branch—and they determined that, except to prevent a failure to elect, (in that event the House voting by *States* should elect,) Congress should have nothing to do with the choice of President or Vice-President. The Constitution casts that duty on the States. It says that each State, large or small, shall have two votes, and also as many additional votes as it has Representatives, and that each State shall appoint the electors in such manner as the Legislature thereof shall direct. Under this power, the Legislature might direct that the electors should be appointed by the Legislature, by the executive, by the judiciary, or by the people. In the earliest days of the Republic, electors were appointed by the Legislatures. In Pennsylvania they were appointed by the judiciary. Now in all States except Colorado they are appointed by the people. And in contemplation of the Constitution the electors were not as the agents of a party to *elect*, but as independent men, responsible to no one, were to *select* the President and Vice-President.

More completely to separate Congress from all connection with the election of President and Vice-President, the Constitution provides that no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector. And it would be an anomaly indeed if, after the Constitution had thus carefully excluded Congress from any intermeddling with the choice of the President, further than to ascertain who the State said it had appointed, that yet Congress had absolute control over the whole subject, and could while engaged in this summary proceeding of counting the vote adjudge and determine who should be President. If the claim now put forth was to reverse the decision of New York or Massachusetts as to who had been appointed the electors of those States respectively, the claim would hardly secure a patient hearing; but the public have become so accustomed to disorderly proceedings in some of the Southern States, that the determinations of those States do not challenge full respect, and yet the law is the same as to all the States.

The impracticability of the two Houses when met to count the votes of the presidential electors going behind the final decision of the States, and attempting to find out which set of electors in very truth have received the most votes, is a conclusive argument against the existence of any such power in the two Houses. If Congress enters upon the work of investigating which of two or more sets of electors have been chosen, it must do its work thoroughly, or it does gross injustice. It would not answer for Congress to examine the returns of the county canvassing boards for the purpose of reversing the decision of the State canvassing board, and then refuse to examine the returns of the precincts when invited to do so, for the purposes of showing that

the county boards were in error. It would not answer for the two Houses to examine the state of the vote of Florida, Louisiana, and South Carolina for the purpose of showing that the Hayes electors were not elected, and then refuse to examine the vote of Mississippi, Alabama, and Georgia, when so requested, for the purpose of showing that the Tilden electors were not chosen. How, by possibility, could this investigation into the popular vote be effected? There are probably seven millions of votes. On the first Wednesday of December the electors give their votes as required by the Constitution by ballot, and that imports secrecy. The list of the votes is then transmitted sealed (secrecy again) to the President of the Senate, and these lists are first to be opened when the two Houses meet to count the votes. According to the theory of the Constitution no one is to know until the two Houses are thus assembled what has been the action of the electoral college. And to claim that in the February before the 4th of March, when the President is to be inaugurated, the two Houses are to go behind the final determinations of the States and make a canvass to find out the very truth as to which set of electors have the majority of lawful votes is an absurdity, because an impossibility. An investigation by the two Houses behind the final determination of the State would lead to anarchy and to nothing better.

It is urged that without such investigation by the two Houses the President may be elected by fraud. Then change the laws. It would, however, be found that the opportunity for fraud would be multiplied many fold if the regulation of the election was transferred from the States to the General Government.

It is said that if we take as final the determination of the State board the result may be that while one citizen has a popular majority another citizen will be inaugurated President. Our Government is not that of a mob. It is not majorities, but *legal* majorities that control. Under our system many complex functions are invoked to obtain an expression of the constitutional will. Thus Delaware cast one electoral vote for every 40,000 inhabitants, and New Jersey only one electoral vote for every 110,000 inhabitants. The democratic majority in New York is 50,000, and the State government by the same election is republican. We have agreed to the Constitution, and if the expression of the will of the people is according to that instrument it is right. The complaint that one possibly, and I do not say probably, having a popular majority will not be inaugurated, seems a pretense.

I conclude that a State is as sovereign in its right finally to determine who has been elected presidential electors as it is to determine who have been elected legislators or governor, or to decide what shall be the punishment of crime within its borders, or what law shall regulate the transfer of property; and as this nation extends and grows the wisdom of making the States the final judges

in this and many other things will become year by year more apparent.

I am confirmed in the correctness of my conclusions by the impressions of distinguished public men who differ from me in political views, and even by my own opinion expressed in the Senate when the question had not possibly any partisan significance.

Recently, when this question was before the country, Chief-Justice Church, of the court of appeals of the State of New York, made this expression in a letter which he gave to the public:

I have always expressed the opinion that the authentication of the election of presidential electors according to the laws of each State is final and conclusive, and that there exists no power to go behind them.

And Senator Bayard, on the 25th February, 1875, when the Senate had under consideration the bill to provide for counting the votes for President and Vice-President, after reading the twelfth amendment to the Constitution which makes provision for counting the electoral vote, said:

There is nothing in this language that authorizes either House of Congress or both Houses of Congress to interfere with the decision which has been made by the electors themselves and certified by them and sent to the President of the Senate. There is no pretext that for any cause whatever Congress has any power, or all the other departments of the Government have any power, to refuse to receive and count the result of the action of the voters in the States in that election, as certified by the electors whom they have chosen. That questions may arise whether that choice was made, that questions may arise whether that election was properly held or whether it was a free and fair election, is undoubtedly true; but there is no machinery provided for contest, and no contest seems to have been anticipated on this subject. It is *casus omissus*, intentionally or otherwise, upon the part of those who framed this Government, and we mus ttake it as it is; and if there be necessity for its amendment, for its supplement, that must be the action of the American people in accordance with the Constitution itself; and I am free to say that some amendment on this subject should be had.

Senator THURMAN in the Senate on January 7, 1873, when the resolution authorizing an investigation as to whether the election for President and Vice-President had been conducted in Louisiana and Arkansas in accordance with the laws of the United States, expressed views similar to those above quoted from Mr. BAYARD'S speech.

It is proper to state that both of these distinguished Senators stated these views as a matter of first impressions, reserving their final judgment on the question; but first impressions with minds as well furnished as theirs are often more valuable than more carefully considered conclusions.

In the debate of January 7, 1873, I had the honor to follow the Senator from Ohio, [Mr. THURMAN,] and said:

There seems to be no way provided by Congress, and no way I believe that Congress, as the Constitution stands, can provide to try the title of an elector to his office. * * * I take it that the entire control over the manner of appointing the

electors is one of the reserved rights of the States, that they never surrendered the right of determining who should be these electors. The States possess the right of determining who shall be elected and who has been elected as entirely as the United States Government has the right to decide who shall represent the country in England.

These views I had occasion to express again in January last when the bill creating this Electoral Commission was before the Senate, and when I had no idea of being a member of this Commission, and I have seen no reason for changing those views.

And, as still further authority to show that the final decision of the question whether electors have been appointed is with the States, let me call attention to the fact that those who aided in framing and those who lived at the time of the adoption of the Constitution did not consider that Congress, even when acting with the President as a Legislature, had the constitutional power to pass a law under which the two Houses of Congress, or any commission created by the Federal Legislature could inquire into the number of votes by which electors have been elected.

This whole subject was thoroughly considered in 1800, and a bill passed both Houses of Congress, but amendments not being agreed to, did not become a law. That bill provided that a grand committee, in its organization not unlike this Commission, might make inquiry and decide as to everything relative to the election of President and Vice-President over which the Constitution gave the General Government jurisdiction, but did not provide for any investigation or decision as to the procedure which the Constitution has devolved upon the States. It provided that the grand committee should examine and decide; (1) as to the qualifications of persons voted for as President and Vice-President; (2) as to the constitutional qualification of electors; (3) whether the appointment of the electors was authorized by the State Legislature; (4) whether the mode prescribed by the State Legislature had been followed; (5) whether improper means had been used to influence the votes of the electors; (6) as to the truth of the returns of the electors; (7) as to the time and place of giving their votes. And that is all. Congress did not assume that it had any constitutional right to investigate or review the vote on which the electors had been appointed, further than to see that it was according to the mode prescribed by the States. On the contrary, fearing that the very claim which is now set up, of making an investigation as to whether the electors had been duly elected in the States, might be inferred, they guarded against such inference by providing that the grand committee should "not draw in question the number of votes on which any elector should have been appointed."

If Congress when acting in its sovereign legislative capacity had not the constitutional right to confer on the two Houses of Congress

when performing the subordinate duty devolved on them of counting the vote, or upon the grand committee the power "to draw in question the number of votes on which any elector should have been appointed," *a fortiori* the two Houses of Congress, or this Commission without such legislation do not possess such power.

Thus authority fortifies the conclusion that the two Houses of Congress, and consequently this Commission, cannot go behind or reverse the determination as to who has been appointed electors as made by the lawful tribunal of the State.

It has been said that although the Constitution does not give to Congress the right to question the determination of the tribunal which by the laws of the State is finally to decide who has been elected an elector, that in this case the offer is made to prove fraud in that final decision of the State tribunal; that we must assume that the offer is made in good faith, and that fraud vitiates and renders void everything. It is true that fraud when proven before a tribunal having jurisdiction over the question in controversy will vitiate all transactions except such as are judicial or legislative. Without raising the inquiry whether the counting the votes is a procedure that comes within the exceptions, I ask whether it was ever heard that a charge of fraud made before a tribunal that otherwise had no jurisdiction over the question at issue conferred jurisdiction to try the question? Does fraud give power? I knew that it rendered void, but not that it created. Can it be claimed that while under our system of government the determination as to who has been appointed an elector is with the States and not with the Federal Government, the allegation of fraud is potential in changing our system, and transfers the decision of the question as to who has been elected elector from the State to the Federal Government? I think not.

II. The Constitution provides that "no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector," and it is claimed that some holding such offices were appointed electors and were therefore ineligible, and that their votes should not be counted.

The real object of this provision of the Constitution ceased when the electors came to exercise no volition in choosing a President and became the mere agents of a party, but still the Constitution stands and must be enforced if it can be. The provision, I think, is equivalent to saying that no one who holds an office of trust or profit under the United States shall be an elector; and no one has been. In every instance the elector who happened to hold an office of trust or profit under the United States resigned such office before assuming to perform the functions of his office as an elector, or resigned as an elector and another was according to law appointed in his stead.

To my mind it is a sufficient answer to all the charges of ineligibility against electors that the provision of the Constitution on which the charges are based does not execute itself, and no law has been enacted to execute it. It is said that other provisions of the Constitution execute themselves. I think not. Courts are established by law, where the provisions can be vindicated, but this requirement of the Constitution cannot be enforced in the courts after the count before the two Houses has commenced, and after the electors have voted. Neither can the two Houses stop the count for the purpose of ascertaining whether some one or more of the three hundred and sixty-nine electors, thousands of miles away, did or did not thirty years ago accept a commission as a United States commissioner or other unimportant office which he had forgotten he held, and of which his constituency were ignorant. The Houses of Congress have no machinery enabling them to carry on such an investigation, and if a law should be passed to enforce the provision of the Constitution referred to, the penalty for its infraction would not be that the State should be deprived of its vote. And further, the functions of the office of elector are required by law to be performed and in fact were discharged on the first Wednesday of December last, and if the elector were subsequently declared ineligible such decision would not invalidate the act performed on the day fixed. If a State constitution required that a sheriff should have a freehold estate worth $5,000, and if after he had performed the duties of his office for a year he was on *quo warranto* ousted because of its being proven that he had no estate of any kind at any time, no one would claim that his acts as *de facto* sheriff were invalid. The acts of the State governments in the States formerly in rebellion, except those acts that were in hostility to the United States Government, have been recognized by the Supreme Court of the United States as valid, because they were the acts of *de facto* governments. I think there is nothing in the objection founded on ineligibility.

III. Should the votes for President and Vice-President, given by what are called the Hayes electors, in Florida, Louisiana, Oregon, and South Carolina, duly authenticated by those States respectively, be counted?

The Legislature of

FLORIDA,

as authorized by the Constitution of the United States, directs that the presidential electors shall be appointed by the lawful voters of that State voting at their respective precincts; that the inspectors of election at those precincts shall report the result to the county board of canvassers; and in the act of February 27, 1872, it is enacted that

the board of county canvassers shall report to a board of State canvassers, who "shall proceed to canvass the returns of such election, and determine and declare who shall have been elected, as shown by said returns. If any such returns shall be shown or shall appear to be so irregular, false, or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration."

This board of State canvassers, which was to that end created, made its final determination and then declared that the Hayes electors had been elected by about nine hundred majority; and these electors on December 6, 1876, cast their vote for Rutherford B. Hayes. All of which is certified to us by the electors and by the undisputed governor of Florida. On this statement, the votes of the electors should be counted for Governor Hayes.

And what reasons are urged against their being so counted? They are these: The attorney-general of Florida was by law a member of the State board of canvassers, and certifies that the Tilden and not the Hayes electors were duly appointed. But it is clear that his certificate has in law no more validity than a letter from any other citizen of Florida would have, and cannot be recognized by this Commission.

Another reason urged why the vote of the Hayes electors should not be counted is, that after the Hayes electors had cast their votes on December 6, 1876, and about the 1st of January, 1877, Mr. George F. Drew succeeded Governor Stearns as governor of Florida; and on the 26th of January, 1877, fifty days after the electors of Florida had and must, if ever, have cast their votes, Governor Drew certified that the Tilden electors had been elected. It is he who is the governor of Florida when the electors were appointed who must by law certify to their appointment, and not he who is elected after they have been appointed and have discharged all their duties. Governor Drew bases the declaration of his certificate that the Tilden electors had been appointed on the adjudication of the court of Florida to that effect, given on a proceeding in the nature of a *quo warranto* on the 25th of January, 1877. If a State court under a *quo warranto*, fifty days after the electors have according to the Constitution and laws of the United States cast their vote, can invalidate the acts of the electors, then the State courts can control the succession to the Presidency of the United States. It would be strange, indeed, if this Commission should disregard the determination of the State board of canvassers, which the laws of the State say shall determine and declare who have been appointed electors, and should be bound to adopt the conclusions of

a State court clothed with no such power. The Commission should, in my opinion, count the vote of Florida for Rutherford B. Hayes.

The laws of the

STATE OF LOUISIANA

as to the election of electors are similar to those of Florida. The returning officers, consisting of five persons appointed by the State senate from all political parties, constitute the tribunal finally to determine who has been elected, and have authority to reject returns from any place in which they are satisfied that by reason of fraud or violence there has not been a fair election.

It has been claimed that these returning officers have improperly rejected certain returns so as to change the result in the State.

It has been sufficiently shown that neither the two Houses of Congress or this Commission have jurisdiction to go behind and reverse the determination of the tribunal which the State has said shall finally decide who has been elected, and that the allegation of fraud in the action of the returning board does not give jurisdiction over the subject to the two Houses of Congress or to this Commission.

It has been questioned whether there were sufficient laws in Louisiana to authorize the election of electors. It has been shown by others that the objection is not well taken. The revision of the laws—the digest of the laws—the courts of the State, and all the people properly treat their election laws as sufficient, and we while engaged in the summary process of counting the vote may so accept it.

It is said that affidavits of fraud and violence were not filed within the time fixed by the statutes of the State, and that consequently the returning officers had no jurisdiction to decide whether certain returns should or should not be rejected. There may have been abundant reasons why the affidavits were not filed within the prescribed time, and of that the returning officers were to judges. The provision as to time is at best only directory. The affidavits were not jurisdictional; if they were, Louisiana for the want of the affidavits might have been without any determination of the result of the election, and either anarchy must have followed or the result not have been according to the truth as intended by the statute.

It is urged also that the laws of Louisiana require that the final tribunal, called in this State "returning officers," should consist of five members, and of different political opinions, and that in fact it consisted of only four members and these all of the same political opinion.

If the provision that the board must consist of those having different political opinions were constitutional, which I much doubt, the requirement is clearly only directory. It can hardly be claimed that

if one member changed his opinion in a night the determination of the board thereby became void, and that the confusion therefrom resulting must be accepted.

If the board should have consisted of five members, the fact that there were only four does not invalidate its decisions; the law says a majority shall be a quorum. The Supreme Court of the United States consists of nine judges, but it does not cease to be a court because by death or resignation there are only eight. It is seldom that a board of directors is full but no one ever questioned the authority of the board on that account. If the fifth member of the canvassing board was *not* appointed from unworthy motives all will condemn it, but no one would say that the penalty for this impropriety is that the State shall lose its vote.

It has been urged, too, that the votes of Louisiana should not be counted, because, as alleged, it had no State government and Kellogg who signed the electors' certificates was not in truth the governor of that State. And yet, in November and December, when the electors were appointed and when the electoral vote was cast, a State government with Kellogg as governor existed by the consent of both political parties, was represented in both Houses of Congress, had been recognized by every branch of Government, and regulated the public affairs of society in that State.

I see no good reason why the vote of Louisiana, as determined by the State returning officers and as certified by the recognized governor and as cast by the Hayes electors, should not be counted.

There are returned here from the

STATE OF OREGON

two sets of electoral votes, one from Cartwright, Odell, and Watts, certifying that they had cast their votes for Governor Hayes; the other from Cronin, Miller, and Parker, certifying that they had cast two votes for Governor Hayes and one vote for Governor Tilden. The question is which is the true return. I am satisfied the former is, and for these two reasons:

First. By the sixtieth and thirty-seventh sections of the election law of Oregon, it is made the duty of the county clerk to send an abstract of the votes cast in the county for electors to the secretary of state, and it is made his duty, in the presence of the governor, to canvass the votes. The secretary of state is the final and sole canvassing officer.

To ascertain who are the true presidential electors from Oregon, we must discover who the tribunal that the laws of Oregon enact shall finally determine that qestion has adjudged to be such electors; that adjudication may be certified to us by the governor or be made

known to us by the record of such final determination. The governor's certificate is only valuable as evidence of what the final tribunal has adjudicated, and may have been forged, or may from design or mistake be untrue. The two Houses of Congress, or this Commission, will be controlled by the State's decision as to who has been elected. In this case the canvass of the secretary of state, which is the final determination of the question as to who have been elected electors, has been sent in the package containing the list of votes cast for President and Vice-President, and the electoral bill has given us authority to consider papers so presented to us, but without such specific authority, we certainly would look to a record that is controlling.

The canvass of the secretary of state, the State's final determination, being thus before us, shows that Cartwright, Odell, and Watts received 15,200 votes, being a thousand more votes than were received by any other candidates for electors. And the fortieth section of the election laws of Oregon provides as follows, namely:

> That in all elections in this State the person having the highest number of votes for any office shall be deemed to have been elected.

I am at a loss to see how this Commission can do otherwise than deem Cartwright, Odell, and Watts elected electors.

Second. By the very showing of those who claim one vote from Oregon for Governor Tilden, he is not entitled to it. Watts, one of those who had a majority of votes, was, when elected, a postmaster, and Governor Grover therefore concluded that he was authorized to give a certificate of election to Cronin, who had the next highest vote. The governor will find few to agree with him that, when a majority of the people declare by their ballots that they do not want a citizen to hold one of their offices, such a vote gives him a title to the office. But Watts, though a postmaster when elected, resigned that office before December 6, 1876. On that day Cartwright and Odell met, and as Oregon was entitled to three votes, there was a vacancy. Cronin met and he found two vacancies. All three persons whom the governor certified were elected electors, Cartwright, Odell, and Cronin, unite in informing us that there was one vacancy in the college. Cronin says there were two. Under this state of facts Cartwright and Odell filled the vacancy by appointing Watts, who, if ever ineligible, had ceased to be so by resigning the office of postmaster.

Cronin, on the other hand, filled the two vacancies that he found by appointing Miller and Parker electors; and the only question is whether Cartwright and Odell, or Cronin, had the right to fill vacancies. And that question is solved by deciding whether two or one is a quorum and majority of a college of three.

I think the three electoral votes from the State of Oregon for Governor Hayes should be counted.

The first objection made to the vote of the Hayes electors from

SOUTH CAROLINA

is that the Constitution of the United States guarantees to that State a republican government, which it is claimed means a government under which the people exercise the supreme power, and that the State did not have such government.

When the Constitution was being framed Edmund Randolph offered this resolution:

Resolved, That a republican government ought to be guaranteed by the United States to each State.

After the debate this resolution was rejected, and the following adopted:

Resolved, That a republican *form* of government shall be guaranteed to each State.

Few of the States would consent to change the Constitution so that the Federal Government could constitutionally interfere with the State governments further than to see that their *form* of government was republican. Such a change would seriously affect the sovereign character of the State. The government of South Carolina was in November, 1876, unquestionably republican in *form*, and that for us is the only proper inquiry.

Another objection to counting this vote is that the constitution of South Carolina requires that there shall be a registration law, and that there was none, and that consequently the election of electors is void. It is sufficient answer to this objection that the Constitution of the United States provides that the electors of any State shall be appointed "in such manner as the *Legislature* thereof shall direct," and not in such manner as the constitution of the State shall direct. The Legislature in this regard acts under the authority of the Constitution of the United States and is entirely untrammeled by State constitutions.

Another objection is that the Federal troops prevented a free election. The two Houses of Congress and this Commission will not withhold from the Federal Government the presumption that its high officers have acted in accordance with the Constitution, laws, and best interests of the nation, a presumption which in the summary procedure of counting the vote for President and Vice-President will be held to be conclusive.

The two thousand and second section of the Revised Statutes of the United States provides by necessary implication that troops may be detailed to keep the peace at the polls. If troops were present at

the polls the presumption is, and for the purpose of this proceeding the conclusive presumption is, that they were so present to keep the peace. We are not required to go into evidence on this point; especially when we know that to do so would be to delay the inauguration of the citizen who has been elected President until after the 4th of March, and thus as the law stands entirely defeats his inauguration.

My opinion is that the votes of the Hayes electors of South Carolina should be counted.